

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TAN VAN LE, a/k/a TAU VAN LE,

Defendant-Appellant.

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UNPUBLISHED

August 12, 2003

No. 234247

Kent Circuit Court

LC No. 00-008032-FC

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

NGUYEN NGODTU CHU, a/k/a TU NGUYEN  
CHU,

Defendant-Appellant.

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No. 234248

Kent Circuit Court

LC No. 00-011090-FC

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Before: Smolenski, P.J., and Cooper and Fort Hood, JJ.

PER CURIAM.

Defendants Tan Van Le and Nguyen Chu were tried jointly before a single jury. They were both convicted of armed robbery, MCL 750.529, and first-degree home invasion, MCL 750.110a(2). Defendant Le was sentenced to concurrent prison terms of eighteen to ninety years for the armed robbery conviction and eight to twenty years for the home invasion conviction. Defendant Chu was sentenced as a third habitual offender, MCL 769.11, to concurrent prison terms of thirty to ninety years for the armed robbery conviction and fifteen to forty years for the home invasion conviction. They both appeal as of right. Their appeals have been consolidated by this Court. We affirm.

I

On appeal, both defendants argue that separate juries or separate trials were warranted and necessary. Each defendant requested a separate jury before jury selection began. The trial

court denied the requests. We review the trial court's decision for an abuse of discretion. *People v Hana*, 447 Mich 325, 331; 524 NW2d 682 (1994), amended 447 Mich 1203 (1994).

MCR 6.121 provides, in relevant part:

(C) On a defendant's motion, the court must sever the trial of defendants on related offenses on a showing that severance is necessary to avoid prejudice to substantial rights of the defendant.

(D) On the motion of any party, the court may sever the trial of defendants on the ground that severance is appropriate to promote fairness to the parties and a fair determination of the guilt or innocence of one or more of the defendants. Relevant factors include the timeliness of the motion, the drain on the parties' resources, the potential for confusion or prejudice stemming from either the number of defendants or the complexity or nature of the evidence, the convenience of the witnesses, and the parties' readiness for trial.

In *Hana*, *supra* at 346-347, the Court stated:

Severance is mandated under MCR 6.121(C) only when a defendant provides the court with a supporting affidavit, or makes an offer of proof, that clearly, affirmatively, and fully demonstrates that his substantial rights will be prejudiced and that severance is the necessary means of rectifying the potential prejudice. *The failure to make this showing in the trial court, absent any significant indication on appeal that the requisite prejudice in fact occurred at trial, will preclude reversal of a joinder decision.* [Emphasis added.]

"Inconsistency of defenses is not enough to mandate severance; rather, the defenses must be 'mutually exclusive' or 'irreconcilable.'" *Id.* at 349. Further, "[i]ncidental spillover prejudice, which is almost inevitable in a multi-defendant trial, does not suffice." *Id.*, citing *United States v Yefsky*, 994 F 2d 885, 896 (CA 1, 1993).

In this case, defendants were not entitled to separate trials or separate juries. Neither defendant clearly, affirmatively and fully demonstrated that any substantial right would be prejudiced by a joint trial, or that separate trials or juries were necessary to alleviate any prejudice. MCR 6.121(C). In addition, neither made a persuasive argument that separate trials were necessary to promote fairness and a fair determination of guilt or innocence. MCR 6.121(D). The arguments offered to support the use of separate juries were without merit. Defendants did not implicate one another as part of their defenses. Rather, they presented virtually identical alibi defenses, which were not irreconcilable or mutually exclusive. Also, there was no potential for jury confusion because the evidence against the two defendants was the same.

In addition, neither defendant has demonstrated that the requisite prejudice actually occurred at trial such that reversal is required. *Hana*, *supra*. We disagree that Chu's closing argument compromised Le's defense in any manner. In closing, Chu's counsel argued that an alibi witness, Amy Gaines, was probably offered money for her testimony. After Chu's closing argument, Le's counsel indicated that he "violently" disagreed with the proposition, espoused by

Chu's counsel, that Gaines may have been bribed. The trial court indicated that there was no reason why Le's closing argument had to track Chu's argument. The Court in *Hana* recognized that, in a joint trial, each defendant will inevitably put their own spin on a witness' testimony. *Hana, supra* at 348. However, this does not automatically require severance. *Id.* In this case, Chu's counsel put his own spin on the testimony and evidence when he argued that Gaines was probably offered money. While Le's counsel did not agree with this position, he was given ample opportunity address the jury and explain Le's theory of the case and Le's spin on the evidence. The jury was subsequently instructed that the case must be decided on the evidence and that the lawyers' arguments were not evidence. Under the circumstances, Chu's closing argument did not substantially prejudice Le's case.

Similarly, Chu's case was not substantially prejudiced by the trial court's decision to proceed with a single jury. Chu argues that he was prejudiced by testimony that Le offered Gaines money to lie about the alibi. Gaines testified that Aivi Nguyen, another alibi witness, promised Gaines money in exchange for lying about the alibi. Aivi told Gaines the money would come from Le. Gaines testified that she never directly talked to Le about lying in court. The evidence, that Gaines was offered a bribe, would have been admissible against Chu even if he had a separate trial or separate jury. It was undisputed that Chu and Aivi had a romantic relationship. Both Chu and Le planned to offer Aivi as an alibi witness. Evidence that Aivi offered Gaines money to testify, regardless of where the money was supposed to come from, reflected on the alibi defense as a whole. It was relevant to the issue of Chu's guilt and reflected on the credibility of Aivi's alibi testimony. Because the evidence was admissible against Chu, its admission at the joint trial before a single jury was not prejudicial.

## II

On appeal, Le challenges certain questions that the prosecutor posed to Aivi Nguyen about hiring and paying for counsel for codefendant Chu and himself. Le objected to the challenged conduct at trial. Preserved claims of prosecutorial misconduct are evaluated by viewing the prosecutor's statements in context to determine if the defendant was denied a fair and impartial trial. *People v Truong (After Remand)*, 218 Mich App 325, 336; 553 NW2d 692 (1996).

The prosecutor's line of questioning was relevant. It assisted the prosecutor in establishing Aivi Nguyen's bias and lack of credibility.

Bias is a common-law evidentiary term used "to describe the relationship between a party and a witness . . . in favor of or against a party. Bias may be induced by a witness' like, dislike, or fear of a party, or by the witness' self-interest." [*People v Layher*, 464 Mich 756, 762; 631 NW2d 281 (2001) (citation omitted).]

Evidence of bias is "almost always relevant." *Id.* at 764. MRE 611(b) specifically provides that "[a] witness may be cross-examined on any matter relevant to any issue in the case, including credibility." In this case, the prosecutor's questioning demonstrated Aivi's self-interest in the case. She was involved in hiring and paying for the defendants' counsel and was the main alibi witness. Because the prosecutor's questioning was an appropriate exploration of Aivi's bias and credibility, there was no misconduct. We note that the testimony actually elicited from Aivi was

not highly inflammatory. In fact, while the prosecutor tried to elicit testimony that Aivi hired and paid for the lawyers, Aivi actually testified that she hired Le's attorney at the request of Le's father and that she only delivered money from Chu's family to Chu's lawyer.

### III

Le also challenges the prosecutor's closing argument that Aivi's original diary and appointment book were in the possession of Le's counsel and were not produced at trial. Le contends that this argument shifted the burden of proof to him. As previously noted, preserved claims of prosecutorial misconduct are evaluated by viewing the prosecutor's comments in context to determine if the defendant was denied a fair and impartial trial. *Truong, supra*. Viewed in this manner, the prosecutor's argument did not shift the burden of proof or deny Le a fair trial.

The challenged argument was a proper comment on the alibi theory offered by the two defendants.

[W]here a defendant . . . advances, either explicitly or implicitly, an alternate theory of the case that, if true, would exonerate the defendant, comment on the validity of the alternate theory cannot be said to shift the burden of proving innocence to the defendant. Although a defendant has no burden to produce any evidence, once the defendant advances evidence or a theory, argument on the inferences created does not shift the burden of proof. [*People v Reid*, 233 Mich App 457, 478; 592 NW2d 797 (1999), citing *People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995).]

Le implied, through questioning at trial, that the alibi defense was corroborated by Aivi's books, which were willingly surrendered to the police. In closing argument, the prosecutor commented on the weakness of the alibi theory and noted that the appointment book was altered. The prosecutor argued that the alterations could not be seen on the copies, which were made and produced at trial. She further argued that, if the books really corroborated the alibi, they could have been produced. She noted that the books were in the possession of defense counsel. At no time did the prosecutor argue or suggest that Le had to offer evidence of his innocence. Reviewed in context, the challenged arguments were not improper. *Truong, supra*.

### IV

Le argues that the trial court abused its discretion when it denied a request for a continuance to allow the defendants to review certain tapes before the prosecutor finished her cross-examination of Aivi Nguyen. This issue is not preserved because neither defendant actually requested an adjournment or continuance before the cross-examination continued. Chu's attorney specifically asked to be allowed to review the tapes before his redirect examination of the witness. This request was ultimately granted. Even if we viewed certain statements made by Chu's counsel to the trial court as a request for a continuance before the cross-examination concluded, we find no error requiring reversal. A denial of a request for an adjournment or continuance is not a ground for reversal unless the defendant demonstrates that prejudice resulted from the court's abuse of discretion with respect to the motion. *People v Snider*, 239 Mich App 393, 421-422; 608 NW2d 502 (2000), citing *People v Pena*, 224 Mich

App 650, 661; 569 NW2d 871 (1997), mod 457 Mich 885 (1998). Le cannot demonstrate the requisite prejudice. While he repeatedly argues that the denial of a continuance deprived him of adequately prepared counsel, he fails to articulate how the prosecutor's continued cross-examination and his counsel's conduct during that examination were affected because the tapes were not reviewed beforehand. In other words, Le has not shown that the denial of a continuance, after the production of the tapes, but before the prosecutor's continued cross-examination, prejudiced the outcome of his case.

## V

In a standard 11 brief, Le argues that improper racial profiling and the prosecutor's portrayal of him as a member of the Asian Pride gang prejudiced the jury against him. This argument is based on misinterpretations or a misreading of the record. The jury did not hear testimony or argument that either indicated, suggested, or implied that Le was in any gang, that he was in the Asian Pride gang, that there was a gang named "Asian Pride," or that the robbery was gang-related. The jury heard testimony that two detectives were specially trained with respect to Asian crimes and Asian gangs, but this training was not specifically related to this case. Accordingly, this issue has no merit.

## VI

Le further argues that the trial court erred when it failed to give cautionary instructions concerning accomplice testimony. This argument likewise has no merit because the record reveals that the instructions in question were actually given to the jury.

## VII

Le next contends that the prosecutor committed misconduct by vouching for the credibility of accomplice Dung Nguyen's testimony and by failing to correct his testimony that he did not receive a deal for testifying. The issues were not preserved with an appropriate objection at trial and, therefore, are reviewed for plain error affecting Le's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999); *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001).

The prosecutor did not vouch for Dung Nguyen's testimony during her opening statement. In her statement, she outlined the testimony the jury would hear from Dung Nguyen. She also indicated that the jury would hear testimony that the information Dung Nguyen gave to the police was investigated and corroborated. "The purpose of an opening statement is to tell the jury what the advocate proposes to show." *People v Moss*, 70 Mich App 18, 32; 245 NW2d 389 (1976) (M.J. Kelly, J.), aff'd 405 Mich 38 (1979). This does not mean that a prosecutor cannot characterize evidence or use strong language. *Id.* Opening remarks are deemed proper if they relate to the evidence the prosecutor intends to present. *People v Mayhew*, 236 Mich App 112, 123; 600 NW2d 370 (1999). While a prosecutor may not vouch for the credibility of her witnesses, she may argue from the evidence and reasonable inferences that her witness is telling the truth. *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997). Here, the prosecutor's statements related to the evidence she intended to present. They did not amount to improper vouching.

We further disagree that the prosecutor engaged in misconduct by failing to correct Dung Nguyen's testimony that he received nothing in exchange for his testimony. The transcript citation given by Le in support of his position that Dung Nguyen lied about his deal is erroneous. Moreover, the record reveals that Dung Nguyen pleaded guilty to conspiracy to commit home invasion and conspiracy to commit armed robbery and was sentenced to one year in the county jail for the conspiracy to commit home invasion conviction, and five years' probation for the conspiracy to commit armed robbery conviction. In addition, he was ordered to pay restitution in an amount over \$140,000. The prosecutor did not allow any false testimony to go uncorrected.

## VIII

Le also argues that photographic lineups containing his picture were conducted in violation of his Sixth Amendment right to counsel. This issue was not raised below and, therefore, is unpreserved. Accordingly, we review the issue for plain error. *Carines, supra*.

Le was not entitled to counsel at the photographic lineups that were held shortly after the robbery and before he was in custody. A defendant is generally not entitled to counsel at a precustodial, investigatory photographic lineup. *People v McKenzie*, 205 Mich App 466, 471-472; 517 NW2d 791 (1994). Counsel is only required when there are unusual circumstances. *Id.* Before the precustodial photographic lineups in this case, Le was not in custody and was not contacted or questioned about the crimes. He had fled Michigan. There were no unusual circumstances that necessitated counsel at the lineups. *Id.* at 472-473. Le also argues, however, that improper photographic lineups were conducted after he was placed into custody. The record does not support this contention. Specifically, there is no evidence that any post-arrest lineups took place without the presence of, or knowledge of, Le's counsel. Thus, there was no plain error with respect to the photographic lineups. *Carines, supra*.

## IX

Le also argues that the cumulative effect of many errors requires reversal. The cumulative effect of several minor errors may warrant reversal in some cases even where individual errors in the case would not. *People v Cooper*, 236 Mich App 643, 659-660; 601 NW2d 409 (1999). In order to reverse on the basis of cumulative error, the errors must be of consequence. *Id.* The effect of any errors must be seriously prejudicial to warrant a finding that the defendant was deprived of a fair trial. *People v Knapp*, 244 Mich App 361, 388; 624 NW2d 227 (2001). The allegations of error asserted by Le on appeal have no merit. Thus, we cannot conclude that any errors of consequence combined to deprive Le of a fair trial. We note that, in his argument, Le alleges several other trial errors that are not separately raised or discussed in his briefs, including the alleged use of hearsay throughout trial, the use of certain tape recordings, the alleged harassment of witnesses by the police, and alleged evidence of another crime. These issues are not properly before us because they are not raised in the statement of questions presented. *People v Hoffman*, 205 Mich App 1, 20; 518 NW2d 817 (1994). Further, Le fails to explain or rationalize his position with respect to any of these allegations. He merely lists the allegations and complains that the cumulative effect of the errors denied him a fair trial. This Court declines to consider issues that are given cursory treatment with little or no citation to authority. *People v Connor*, 209 Mich App 419, 430; 531 NW2d 734 (1995).

## X

Finally, Le argues that his eighteen to ninety year sentence for armed robbery is disproportionate and shocking to the judicial conscience. Because Le was sentenced within the recommended range of the legislative sentencing guidelines and does not allege a scoring error or assert that inaccurate information was considered at sentencing, we affirm Le's sentence. MCL 769.34(10).

## XI

Chu argues on appeal that the evidence was insufficient to establish his identity as one of the perpetrators. When reviewing the sufficiency of the evidence in a criminal case, this Court "must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt." *People v Hoffman*, 225 Mich App 103, 111; 570 NW2d 146 (1997), citing *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). All evidentiary conflicts must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997). We will not interfere with the jury's role of determining the weight of the evidence or the credibility of witnesses. *Wolfe, supra* at 514-515.

In making his argument, Chu asks this Court to discount the testimony of Dung Nguyen and his girlfriend. Chu argues that Dung Nguyen was not credible because he was an accomplice and that Dung Nguyen's girlfriend was not credible by virtue of the fact that she was his girlfriend. Chu also asks this Court to discount the testimony of two of the victims, who made in-court identifications of both him and Le. This Court cannot view the evidence in the manner suggested by Chu. As previously noted, we will not interfere with the jury's role of determining the weight of the evidence or the credibility of the witnesses. *Wolfe, supra*. Further, we are required to draw all inferences and make credibility choices in support of the jury's verdict. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

Viewed in this manner, the evidence was sufficient to support Chu's conviction. It was undisputed that Chu and Le were together in Michigan at the time of the robbery. Dung Nguyen testified that he told Chu, Le and a third man, Trung Duc Lu, about the victims. They subsequently discussed the robbery while at a Motel 6. Dung Nguyen specifically identified Chu as one of the men who discussed the robbery, left to commit the robbery, returned to the motel with jewelry, and told Dung Nguyen details about the robbery. Dung Nguyen's girlfriend also identified Chu as one of three men she observed with Dung Nguyen at the Motel 6. She also saw jewelry on the bed in the hotel. In addition, two of the victims positively identified Chu at trial. One testified that Chu was the robber who pointed the gun at her head. She testified that the robbers were in the house for approximately one hour. Their faces were not covered and she was able to get a good look at them. While this victim did not positively identify Chu in a photographic lineup, she testified that it is easier to identify someone face to face than through a picture. Similarly, while the other victim did not positively identify Chu during a pretrial photographic lineup, she positively identified him in court. Moreover, this victim actually picked Chu out of the pretrial photographic lineup and indicated that he looked like the "chubby" perpetrator. She was seventy percent sure at the time she viewed the photographic lineup, but she was positive when she saw Chu in person. She, too, noted that the robbers were in the house for approximately one hour. She had ample time to observe the robbers and see their faces. In addition, the evidence supported that Chu, Le and a third person fled Michigan on the day of the robbery. Viewed in a light most favorable to the prosecution, *Wolfe, supra*, the evidence was

sufficient to enable the jury to find beyond a reasonable doubt that Chu was one of the people who committed the charged crimes.

## XII

Finally, Chu argues that the trial court abused its discretion by allowing hearsay testimony about his nickname. We disagree.

The prosecutor questioned a detective about whether Chu was known by any nicknames. She followed up by asking what the nicknames were. At that point, Chu's counsel objected, arguing that the testimony was hearsay. The prosecutor indicated that she was offering the testimony because she believed other witnesses may refer to Chu by his nickname when testifying. The trial court conditionally allowed the testimony, noting that defense counsel could follow up with the witness about the basis for his knowledge. The information would later be stricken if it was determined that the witness did not have the ability to competently testify about Chu's nickname. Chu's counsel never followed up on the issue.

The admission of the testimony, subject to exploration of the foundation, was not an abuse of discretion. Evidence of a defendant's use of an alias is admissible to establish identity. *People v Phillips*, 217 Mich App 489, 497; 552 NW2d 487 (1996). Further, it is not apparent that the testimony was hearsay. The detective had prior contacts with Chu and may have learned Chu's nickname from Chu himself. If so, the evidence would not be hearsay. MRE 801(d). Further, even if the testimony could be considered improper, reversal is not warranted. "[A] preserved, nonconstitutional error is not a ground for reversal unless 'after an examination of the entire cause, it shall affirmatively appear' that it is more probable than not that the error was outcome determinative." *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). In this case, the victims testified that one of the robbers was fat or chubby. The jury had the opportunity to observe Chu at trial. Evidence that Chu's nickname was "Fat" had little, if any, bearing on the case. The admission of Chu's nickname did not affect the outcome.

Affirmed.

/s/ Michael R. Smolenski  
/s/ Jessica R. Cooper  
/s/ Karen M. Fort Hood